F. M. S. REPORTS.

[COURT OF APPEAL (CRIMINAL)]

POYSER, C.J., McELWAINE, C.J. (S.S.) & TERRELL, J.A.

June 22, 1939.

PUBLIC PROSECUTOR - - - Appellant

v.

RAMAN I
RAMAN II
AYAPPAN - - - - - Respondents.

[NEGRI SEMBILAN CRIMINAL APPEAL No. 5 of 1939]

Criminal Procedure Code (Cap. 6) section 115(v) —Confession—Statements made on affimation to a Magistrate—Admissibility—Criminal Procedure Code (Cap. 6) section 420.

The three respondents in this case and one other were jointly charged with the murder of one Gengan on the 7th of January, 1939, and were acquitted by the trial Judge on the 22nd of March, the fourth accused being discharged but not acquitted. At the trial certain statements made by the respondents to a Magistrate on affirmation were tendered in evidence by the prosecution but they were rejected by the trial Judge.

The Public Prosecutor appealed mainly on the ground that the trial Judge was wrong in law in rejecting those statements.

Held by the Court of Appeal, that, as the statements were made on affirmation and this was contrary to the provisions of section 115 (v) of the Criminal Procedure Code (Cap. 6) section 420 of the Criminal Procedure Code (Cap. 6) did not apply and the statements were rightly rejected.

Cases referred to:—

(1) *Chow Eng v. Public Prosecutor,* (1924) 4 F.M.S.L.R. 289.
(2) *Kishan Chand v. Emperor,* (1938) A.I.R. Peshawar 5.
(3) *Mohamed Ali v. Emperor,* (1934) A.I.R. All. 81.
(4) *Mohamed Din v. Emperor,* (1938) A.I.R. Lah. 200.
(5) *Mohamed Isa v. Public Prosecutor,* (1938) F.M.S.L.R. 72; 8 M.L.J. 160.
(6) *Nazir Ahmad v. Emperor,* (1936) A.I.R. P.C. 253.
(7) *Ong Hock v. Rex,* 8 M.L.J. 232.
(8) *Queen v. Coote,* L.R. 4 P.C. 599.
(9) *Queen Empress v. Ragu,* (1898) 23 Bom. 221.
(10) *Queen Empress v. Visram,* (1896) 21 Bom. 501.
(11) *R. v. Bird,* 19 Cox C.C. 180.
(12) *R. v. Boyle,* 20 T.L.R. 192.
(13) *R. v. Chidley,* 8 Cox C.C. 365.
(14) *R. v. Robinson,* L.R. 1 C.C.R. 80.
(15) *R. v. Santokh Singh,* (1933), S.S.L.R. 147; 2 M.L.J. 178.
(16) *R. v. Scott,* Dears & Bell 47.
(17) *R. v. Tara Singh,* (1933), S.S.L.R. 533; 2 M.L.J. 40.
(18) *R. v. Tubby,* 5 C. & P. 530.
(19) *R. v. Wong Ah Kin,* (1935), S.S.L.R. 181; 4 M.L.J. 169.
(20) *Ram Naresh v. Emperor,* (1939), A.I.R. All. 242.
(21) *Rasiah v. Public Prosecutor,* (1931–1932) F.M.S.L.R. 45.
(22) *Subrahmania v. Emperor,* 25 Mad. 61.
(23) *Tok Sam Mui v. Rex,* 8 M.L.J. 183.

Adrian Clark, Public Prosecutor, Appellant:— Appeal is against acquittal of the three respondents. Four accused were jointly tried, these three and one Velupillai. Upon the acquittal of the three respondents the Deputy Public Prosecutor did not proceed further against Velupillai and he was discharged such discharge not amounting to an acquittal. Though in form this is necessarily an appeal against acquittal in substance it is against the rejection of evidence tendered by the prosecution in the form of statements and a confession by these three respondents. Had such statements been admitted and the trial then resulted in an acquittal there would have been no appeal but the prosecution was entitled to have its case fully heard. If this Court holds that the statements ought to have been admitted but that the result would have been such a conflict of evidence that the conviction of none of the four accused would have been satisfactory I am prepared to be guided by such a view in respect of any further proceedings. If the Court holds the statements to have been properly rejected I will not proceed further against Velupillai as it would in the circumstances not be fair to him to do so: The respondents have not been rearrested as my main object is to get the law correctly laid down.

I ask the Court to decide what the existing law actually is—not what it ought to be. If this Court, having construed the existing statutory provisions in

accordance with proper canons of construction, considers the law requires amendment, I undertake to see that such amendment shall be considered. My submission is that, if the existing law be properly construed these statements were wrongly rejected.

The Grounds of Decision furnished by the learned Judge are headed "Further Grounds of Judge's Decision herein to which are added a few words of criticism" I have no objection to dealing with these but ask for this Court's directions as to this unusual addendum.

The Court here ruled that references by the learned trial Judge to matters alleged to have occurred extra-forensically would not be considered by the Court and need not be dealt with but that they would hear the Public Prosecutor on the propriety of trying all four accused jointly.

The facts although substantially simple involved problems of procedure new to my experience and solved after considerable discussion with my Deputies in the only manner which appeared to me to be fair to all four accused.

The stabbing took place on pay night on an estate employing both Tamils and Malayalam coolies. Deceased, Gengan, a Tamil, was drunk and quarrelsome. There was a fight between him and the respondents (Malayalees) starting with fists and sticks but ending by his being stabbed in the back. Before he died Gengan stated, not once but many times and to five different witnesses, that it was Velupillai who stabbed him; his wife Sinnamah, swore she saw Velupillai stab Gengan; a knife was discovered in Velupillai's room, concealed under his mattress, and Sinnamah identified it from amongst a number of similar knives; there could be little doubt that Sinnamah was in the fight as she bore marks of stick blows and she accused Velupillai on the spot. According to her evidence, moreover, all four accused eventually set on Gengan together and one held him down while Velupillai stabbed him. There was therefore evidence of common intention against all four borne out by other witnesses who testified that all four were in the fight and medical evidence corroborating this. On the other hand, two days after the stabbing, the other three asked to see a Magistrate and all three made voluntary statements. Although accounts given in these statements differ in material respects Raman II, in his statement, confessed that it was he and not Velupillai who had stabbed Gengan, Velupillai alleged that he had seen Raman II take a vegetable knife from a bucket and that Raman II had afterwards admitted the stabbing; Raman I said that he saw Raman II and Gengan fall to the ground together and that at that time Velupillai was no longer in the fight; and Ayappan stated he saw Raman II pick up the vegetable knife and stab Gengan. (Velupillai is said to be uncle to two of the three other accused) Moreover medical evidence was to the effect that Vellupillai's knife could not have caused the wound inflicted on Gengan while the vegetable knife could have done so.

In these circumstances it appeared to me to be the only fair course to try all four together, even though this would most probably result in the acquittal of all four. My reasons were the following:—

(a) there were the facts I have referred to and certain further evidence of common intent (b) if Velupillai were tried alone there was evidence which might well convict him in the absence of the statements made by the two Ramans and Ayappan and these statements could not, in such a case, be tendered by the prosecution nor could these accused be asked or relied on to give evidence for the prosecution or for the defence. On the other hand if Raman II were charged alone the prosecution could not rely on the other three accused to give evidence for the prosecution and the bulk of the other witnesses who were available and whom the prosecution would be bound to call, in the circumstances of this case, would be called to give evidence contradicting the charge in support of which it purported to be given—namely—"it was not the man in the dock but someone else who committed this crime".

It was possible that *both* Velupillai and Raman II in fact drew knives on Gengan: that he and his wife only saw Velupillai do so but that it was Raman II who alone stabbed (Gengan was stabbed in the back) but, in all these circumstances I thought, and still think, the only fair course was to try all four accused jointly, since that was the only way in which all the evidence could be put before the Court. It is not for a Public Prosecutor to try and decide such a case, on paper, and in his chambers. A man had been criminally killed; it was for a Court to sift and decide on all the available evidence even if the result would be a formal acquittal of all four.

The learned Judge has now, after the event, criticized this procedure. I would point out that these four accused were, at their trial, separately represented by three learned counsel and that not one of these took any objection to the trial being a joint one

(probably because each realized that such a course gave his client the best chance of an acquittal).

I would further point out that, under the Criminal Procedure Code (Cap. 6) section 170 subsection (i) the Court of trial has not only the power but the duty of deciding whether or not persons jointly charged should be tried together or separately. It was for the learned Judge himself—if he thought the procedure unfair to any of the accused to have ordered separate trials. He did not do so; I suggest it is, in these circumstances remarkable that he should take this point only when an appeal has been lodged against his decision, and I further submit that in fact a joint trial was the only procedure fair to all four accused, and especially to Velupillai and to Raman II.

In fact when the Deputy Public Prosecutor tendered the statements of the accused, although Counsel for Raman II was the only one who objected and although his objection was confined to the admission of his client's statement only, the learned trial Judge rejected all four statements. This he did on the ground that the Magistrate (who took the statements at his own house and without having the Criminal Procedure Code by him) had erroneously affirmed each accused before he made his statement contrary to the provision of subsection (v) of section 115 of the Criminal Procedure Code. Unfortunately the provisions of section 420 were not brought to the attention of the learned Judge at the trial. There is no reference to that section in his note of the reasons given by him at the time for the rejection of these statements, though in his grounds of decision, given after this appeal had been entered, the learned Judge maintains that the rejection was correct, notwithstanding the provisions of section 420, since in his opinion the statements were not "duly" made.

In my submission:

Section 420 of the Criminal Procedure Code was inserted in it to meet the very kind of case we are here dealing with, namely, a magistrate who is not legally trained and who, taking a confession at his home and without any books of reference, makes a slip in procedure which in way could cause injustice to the accused.

There is nothing fundamental about the administration of an oath. Compare the Affirmations Enactment (Cap. 14) section 12. If when the law provides that an oath ought to be taken and it is omitted that evidence is still admissible and the proceedings lawful then a *fortiori* a confession cannot be rendered inadmissible because an affirmation has been made when it should not be.

Confessions are the most relevant evidence that exists and all are *prima facie* admissible. The Evidence Enactment lays down the exceptional cases in which confessions are not admissible and it is only if a confession comes within the terms of one of these statutory exceptions that it should be excluded. All these exceptions are founded on safeguards against a confession being deliberately untrue owing to the circumstances in which it was made. If a man who has already volunteered to confess is afterwards affirmed before making his statement that cannot conceivably result in his changing his volunteered confession into a false one.

Subsection (v) of section 115 of the Criminal Procedure Code was inserted after the decision in the case of *Chow Eng v. Public Prosecutor*[1]. That case is no longer relevant since the form of affirmation which was the ratio of that decision no longer exists. In any case I submit it was an erroneous decision since the accused in that case had already confessed before he was affirmed. I call attention to the provisions of what is effect our Code of Evidence (Cap. 10), sections 5, 17, 18(i), 21 and Illustrations 24 to 30 inclusive, 80, 159 and 160. I also call attention to recent case of *Tok Sam Mui v. Rex*[23].

Subsection (v) of section 115 is purely procedural and a breach of it is only an error in procedure.

I do not rely on section 422 which deals with irregularities in proceedings nor do I submit that this unnecessary affirmation was an "irregularity".

I rely on the *ipsissima verba* of section 420 and submit that this Court must construe that section according to the ordinary meaning of the words contained in it and must deduce the intentions of the Legislature (which retained those words when the whole Criminal Procedure Code was re-enacted in 1926 with the inclusion of subsection (v) of section 115) from the ordinary meaning of the words and not from any strained or fanciful construction of them.

The construction which the learned Trial Judge has sought to put on section 420 leads to a logical impasse: If "duly made" in section 420 means "made in accordance with the provisions of the law" section 420 would provide that if any of the provisions of section 115 have not been complied with the confession can be admitted if all the provisions of section 115 *have* been complied with—which is absurd.

I call attention to the words "*any* of the provisions". Is subsection (v) one of those provisions? It clearly is. Has it been complied with? It clearly has not. Has the error injured the accused as to his defence on the merits? Again, it clearly has not, and that, I submit is the basic principle underlying this section.

What then does "duly made" mean? I have shown that it cannot mean "made in accordance with the provisions of the law" I submit that what it does mean, and all that it can mean, is that the confession was voluntarily made and was not made in circumstance which the Evidence Enactment provides should exclude it—that is that it was not caused by an inducement threat or promise having reference to the charge.

In support of my submission that confessions are *prima facie* admissible. I cite:—

Rex v. Wong Ah Kin[19].
Rasiah v. Public Prosecutor [21].
Rex v. Tara Signh[17].
Rex v. Santokh Singh[15].
Ong Hock v. Rex[7].

There is no local case on section 420. In case the Court wishes to consider Indian decisions in respect of section 533 of the Indian Code I call attention to the following:—

Rex v. Santokh Singh[15].
Mohamed Isa v. Public Prosecutor[5]
Chow Eng v. Public Prosecutor[1].
Tok Sam Mui v. Rex[23].
Rex v. Wong Ah Kin[19].
Rasiah v. Public Prosecutor[21].
Rex v. Tara Singh [17].
Ong Hock v. Rex[7].
Queen Empress v. Visram[10].
Queen Empress v. Raghu[9].
Mohamed Ali v. Emperor[3].
Nazir Ahmad v. Emperor[6].
Kishan Chand v. Emperor[2].
Mohamed Din v. Emperor[4].
Ram Naresh v. Emperor[20].

In my submissions these confessions were "duly made" since they were clearly made willingly and without threat or inducement; it was only an error of procedure which led to the men being affirmed; and the provisions of section 420 cover that error and the confessions ought to have been admitted in evidence.

F. A. Briggs for the Respondents:

Where section 115(v) of the Criminal Procedure Code is disregarded and a confession is taken on oath or affirmation, it cannot be said to have been duly made. Therefore no evidence can be given under section 420 that it was duly made. There is an essential distinction between a confession under section 115 being duly made and being duly recorded. If on the face of the document the record of a confession showed that a confession had been made on affirmation, the defect could be cured by evidence under section 420 that it was in fact not made on affirmation, that the record was erroneous, and thus that the confession was duly made. Section 420 is mechanism for bringing before the Court the substance of a confession which was made in accordance with the requirements of law, but was not recorded in accordance with those requirements or for some other reason cannot be brought before the Court. The Evidence Enactment is not a complete or exclusive code of the law of evidence. Parts of the Criminal Procedure Code must be read with it in order to arrive at the correct view. Section 115(v) makes a confession taken on affirmation wholly illegal and inadmissible as evidence. The provisions of the enacted law of evidence are incomplete. Some confessions would be excluded, although apparently admissible, for example, a confession obtained by torture. Any confession is inadmissible unless it is voluntarily made, and the administration of an oath or affirmation renders the Court unable to judge whether the whole of the confession was voluntarily made, although it may appear that it was voluntarily begun. The administration of an oath amounts to a threat or inducement. The obligation to tell "the whole truth" may force the deponent to say what he would otherwise not say. As section 115(v) is purely local, the Indian authorities are inapplicable. So are local authorities such as *Chow Eng v. Public Prosecutor*[1], *Rex v. Santokh Singh*[15], *Mohamed Isa v. Public Prosecutor*[5], *Ong Hock v. Rex*[7], *Tok Sam Mui v. Rex*[23].

Apart from the question of admissibility of these statements, there are other substantial grounds on which the appeal must fail. (On the other grounds he was stopped by the Court, which indicated that it would not in any event make an order prejudicial to the Respondents).

Adrian Clarke in reply:—

The distinction which is sought to draw between "duly recorded" and "duly made" is negatived by the

terms of Section 420, which does *not* say that it is only if those provisions of Section 115 which refer to the recording of the statement are not complied with that the statement can nevertheless be admitted. Section 420 covers "any" of those provisions, therefore it must be construed to cover *all* of them including those of subsection (v).

There may be provisions in other Enactments dealing with special points connected with the law of Evidence but the essential principles are laid down in the Evidence Enactment which is intended to codify the local law of evidence. The suggestion that a confession obtained by torture would not be excluded by that Code is unfounded: no one has ever heard of a person being tortured for the purpose of extracting evidence from him without his first having been asked to make a statement and *threatened,* orally or by necessary implication, with torture unless he did so, torture necessarily involves a prior threat to torture.

The administration of an affirmation involves no threat whatever—and if such affirmation could, as is suggested, oblige the witness to tell "the whole truth" when he would not otherwise have done so, the fact that his statement consists of the whole truth would be a strange reason for rendering it inadmissible.

Cur. Adv. Vult.

Poyser, C.J.—In this case the three respondents were jointly charged with the murder of one Gengan on the 7th of January 1939; they were acquitted by the trial Judge on the 22nd of March. One Velupillay was also charged with them; he was discharged, but his discharge did not amount to an acquittal. The appeal is by the Public Prosecutor on the grounds that the trial Judge was wrong in law in holding that certain statements made by the respondents to the Magistrate, Kuala Pilah, were inadmissible in evidence, and also wrong in acquitting and discharging the respondents on the ground that there was no case against them.

The Public Prosecutor, in opening, made it abundantly clear that although the appeal was in form an appeal against acquittal, in substance it was an appeal on a point of law in regard to which there were conflicting decisions, and he required from us an authoritative decision which would be binding on the Courts of the Federated Malay States. He further stated that if this Court did uphold his argument and formally set aside the order of acquittal, he had no intention of instituting fresh proceedings against the respondents, if this Court considered such proceedings to be undesirable, and we did intimate that we thought such a course would be most undesirable.

In regard to this aspect of the appeal I would only express the opinion that only under the most exceptional circumstances would I consider the question of setting aside an order of acquittal in a murder case, but as in this case whatever order we make will not lead to the retrial of the respondents, there could be not objection, if we uphold the Public Prosecutor's argument, in allowing the appeal *pro forma.*

The evidence which the trial Judge rejected consisted of statements made by the respondents on the 8th of January before a Magistrate. The Magistrate gave evidence and set out the circumstances in which these statements were recorded.

These circumstances were as follows. On the night of the 9th of January the four accused were brought to the Magistrate's bungalow; they told him that they wished to make statements. The Magistrate having satisfied himself that there had been no threats or compulsion recorded their statements after the usual form of affirmation for a witness had been administered to them.

One of the statements, viz. that of Raman II, was in the nature of a confession; the other respondents admitted being present when the deceased was killed, and implicated Raman II.

The trial Judge refused to admit any of these statements in evidence on the ground that to do so would be to ignore "the plain and peremptory provisions" of section 115 (v) of the Criminal Procedure Code. This sub-section is as follows:—

> "No oath or affirmation shall be administered to any person making a statement or confession as in this section provided."

Before this sub-section was enacted this Court held (*Chow Eng v. Public Prosecutor,*) [1] that the administration of an affirmation constituted a threat or inducement and rendered a confession inadmissible.

The correctness of this decision has recently been questioned in the Colony, where there is still no statutory provision similar to section 115(v); but I do not think it necessary that I should at this stage express any opinion on those conflicting decisions. The first point in this case is not whether *Chow Eng v. Public Prosecutor*[1] was correctly decided or not, it is if the prohibition in section 115(v) is disregarded can the Court treat such disregard as an irregularity which can be waived under the provisions of section

420 of the Criminal Procedure Code, and if it can, then the question of whether an affirmation constitutes a threat or an inducement can be considered.

The Public Prosecutor argued that the Criminal Procedure Code is purely a procedural Code, and does not deal with matters of evidence, and that a confession or statement is *prima facie* admissible in evidence, and can only be rejected if it comes under the statutory exceptions e.g. a confession caused by any inducement or threat, a confession to a police officer below the rank of Inspector—(sections 24 and 25 of the Evidence Enactment).

He further argued that section 115 of the Criminal Procedure Code laid down no rules as to evidence; it only laid down a procedure Magistrates were to follow in recording statements, to ensure that such statements were voluntarily made; and that if there was an irregularity in recording such statement, as there was in this case, such irregularity could be corrected under the provisions of section 420. This latter section is as follows:—

> "If any Court before which a confession or other statement of an accused person recorded under section 115 or 256 is tendered or has been received in evidence finds that any of the provisions of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and if it is satisfied of the same such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

I cannot agree that the administration of an affirmation to a person making a confession or statement is an irregularity or a non-compliance of a provision of section 115 which can be corrected under the provisions of section 420.

This section, in my opinion, only allows evidence to be given that a confession or statement of an accused person was 'duly made'. When taking a confession or statement a Magistrate might act irregularly or not comply with a provision of section 115 e.g. the memorandum set out in Section 115 (iii) might be omitted, but evidence could be taken that the confession was in fact voluntarily made (i.e.) 'duly made'. Similarly the record might show that an oath was administered to a person making a confession, and evidence might be given that the record was incorrect, and that in fact an oath was not administered. In this case, however, I do not see how the respondents' statements can be said to have been 'duly made' when it was established that the Magistrate in recording such statements did what section 115 (v) expressly forbids him to do. That is not an omission or irregularity; it is a disregard of the law, and I do not see how a statement taken in direct contravention of statutory provisions can be admitted in evidence.

Further, I cannot agree with the Public Prosecutor's argument that the Criminal Procedure Code is purely a procedural Code; it does contain provisions in regard to evidence, and must be regarded as supplementing the Evidence Enactment and read with it, e.g. section 113, in regard to the admissibility in evidence of statements made to the police.

As I have come to the conclusion that the trial Judge was correct in rejecting these statements and agree with his reasons for so doing, it is unnecessary to consider whether an oath does or does not in law in regard to a confession constitute a threat or inducement. I would finally add that even if these statements had been admitted in evidence by the trial Judge, I do not see how any of the respondents could reasonably have been found guilty of murder.

I would dismiss the appeal.

McElwaine, C.J. (S.S.)—The respondents together with one Velupillay were tried for murder.

At the close of the case for the prosecution Velupillay was discharged, the discharge not amounting to an acquittal. The three respondents were acquitted, the trial Judge being of opinion that the prosecution evidence, even if unrebutted, would not justify the conviction of any one of them.

The Public Prosecutor appealed, his main ground being that had the trial Judge not rejected a confession by the second respondent and statement by the first and third respondents, there would have been some evidence upon which the respondents might have been convicted.

After they had been arrested the respondents were brought before a Magistrate who was satisfied that they desired to make statements. The Magistrate satisfied himself that the statementts were voluntarily made.

Before taking the statements the Magistrate affirmed each of the three respondents. This was due to the Magistrate overlooking subsection (v) of section 115—"No oath or affirmation shall be administered to any person making a statement or confession as in this section provided". It was because of the infraction of this provision that the learned trial Judge rejected both the confession and the statements.

The Legal Adviser argued that this infraction was a mere irregularity curable under section 420 of the Criminal Procedure Code.

Mr. Briggs for the respondents traversed this argument and further argued that the administration of an oath or affirmation under which the deponent undertook to tell the truth the whole truth and nothing but the truth restricted his freedom of statement and thus made the statement not a voluntary one.

Now the mere administration of an oath is not a threat or inducement of the kind mentioned in section 24 of the Evidence Enactment, and I understood Mr. Briggs to admit that the decision *Chow Eng v. Public Prosecutor*[1] could not be supported upon this ground, but that it could be supported on the ground that though the oath or affirmation was not a threat or inducement under section 24 yet an oath or affirmation makes a statement or confession not voluntary and if it is not voluntary it cannot be admitted.

Now I have no doubt that a confession extracted by torture would not be admissible though torture is not mentioned in section 24.

The Legal Adviser suggested that torture really comes under section 24 because such an abuse would be preceded by threat of torture if he did not confess. I can make no such presumption and even if such a threat did precede the torture, it would not be a threat of the kind specified in section 24.

Mr. Briggs is right when he says that section 24 is not exhaustive.

But the administration of an oath is in no way analogous to torture. The reason why torture and the irregularities specified in section 24 render a statement or confession inadmissible is because these matters may cause a person to accuse himself falsely. What the Court wants is the truth and it cannot accept as true a confession or statement obtained by torture or by infraction of section 24. That is the kind of thing that renders confessions involuntary.

Section 29 mentions several modes of obtaining confessions which do not invalidate them—promises of secrecy, deception, making a man drunk, or asking him questions whatever may be the form of those questions. These modes do not invalidate the confession because there is no reason why any of these devices should lead the accused or the suspect to lie. I am at a loss to see how the administration of an oath will lead him to lie. The decisions in the recent cases cited at the Bar, *Ong Hock & Aw Tong v. Rex*[7] and *Tock Sam Mui v. Rex*[23] are in no way binding on this Court, but I see no reason to modify anything I said in the former of those cases, though the latter may require reconsideration in view of *R. v. Scott*[16]; *R. v. Robinson*[14].

Evidence given by a witness on oath in a proceeding having reference to the same or a different matter is receivable against him as confession, *R. v. Chidley*[13]; *R. v. Tubby*[18] *R. v. Bird*[11]; *R. v. Boyle*,[12] so long as there is no statutory protection re wrongful threat or inducement. In the *Queen v. Coote*[8] Sir Robert Collier giving the opinion of the Privy Council referred to several cases and proceeded at p.607:

> "From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on Oath of a Witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle '**nemo tenetur seipsum accusare**', but does not apply to answers given without objection, which are to be deemed voluntary."

As the accused in making a statement or confession is not giving evidence as a witness in a Court proceeding, section 132 (1) does not apply, and, notwithstanding his oath, he is not bound to incriminate himself.

In my opinion the mere administration of an oath which the person is free to refuse to take does not render a confession or statement involuntary or inadmissible. There is no analogy between such an oath and the *ex-officio* oath of the old Court of High Commission.

There remains to be considered whether a voluntary statement or confession which is taken contrary to section 115 (v) can be admitted in evidence.

In my opinion it cannot. This subsection was enacted in a Code passed after the decision in *Chow Eng v. P.P.*[1] and whether that decision was right or wrong the Legislature has imposed the stamp of its authority upon it.

I agree with the Legal Adviser that the Legislature might have done this in other and better ways but it seems to me that for the purposes of section 115 the Legislature has adopted the view that if an oath or affirmation is administered the magistrate cannot certify under subsection (iii) that it was made voluntarily. I cannot regard subsection (v) as a mere direction to

the magistrate. It is an expressed prohibition which must be observed in taking a confession or statement under section 115, and in my opinion before a confession or statement recorded under section 115 (iii) can be put in evidence, it must be shewn to have been taken in the manner prescribed by the section.

The Legal Adviser relied strongly upon section 420:

> "If any Court before which a confession or other statement of an accused person recorded under Section 115 or 256 is tendered or has been received in evidence finds that any of the provisions of such section has not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and if it is satisfied of the same such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

If the confession or statement has been taken in accordance with section 115, it proves itself. If any of the provisions of section 115 have not been complied with by the Magistrate, evidence may be given that such person duly made the statement. In my opinion a confession or statement is not duly made under section 115 unless it has been made in accordance with that section. A statement may have been duly made though the Magistrate has failed to make the memorandum prescribed by subsection (iii). If the Magistrate has not complied with this provision he may give evidence in the terms of the memorandum which he has omitted and the confession or statement may then be received in evidence.

The Legal Adviser stressed the words of section 420 "any of the provisions of such section". "Such section" refers to two sections 115 and 256 and the words "any of the provisions" must be confined to provisions governing the method of recording the statements or confessions. If this is not so, the consequences would be very remarkable. Take section 256. That section contains nine subsections of which (i), (iv,) (v), (vi) and (vii) stress the fact that the questions are to assist the accused. "For the purpose of enabling the accused to explain", " the examination shall not be a general examination on whatever suggests itself to the Court", "the discretion given by this section shall not be exercised for the purpose of inducing him (i.e., the prisoner) to make statements criminatory of himself" "questions shall not be put to the prisoner merely to supplement the case for the prosecution where it is defective".

If the Legal Adviser is right the Court can flout section 256, turn itself into a prosecutor and endeavour to establish the case for the prosecutor out of the prisoner's own mouth, the very thing the section is designed to guard against. Of course, such illegality would be caught by the last line of section 420 "if the error has not injured the accused" but this only indicates the restriction that must be placed on the words "any of the provisions of such section". What evidence can a Court take under section 420 to satisfy itself that a statement made under a searching cross-examination in defiance of section 256 was "duly made"? The proceedings would be an illegality and the statements would not have been "duly made". Similarly, infractions of section 115(v) is an illegality and if that illegality has been committed the statement has not been duly made under section 115.

The marginal note to section 420 correctly represents its scope "procedure when confession irregularly taken." What can be corrected under section 420 is "the error". It is a euphemism to describe doing the very thing forbidden by the statute as "an error". Infraction of section 115(v) is no less an illegality than is misjoinder of charges, and just as the latter illegality cannot be cured under section 422 (*Subrahmania v. Emperor*),[22] so the former cannot be cured under section 420.

In my opinion the confession and statements were rightly excluded and I would dismiss the appeal.

Terrell, J.A.—At the trial four persons, Velupillay, Raman I, Raman II and Ayappan, were jointly charged with the murder of one Gengan on the 7th January, 1939. On the 9th January 1939, all four accused made sworn statements before a Magistrate. The statement by Raman II was a confession. The other statements were admissions but did not amount to confessions, although they all purported to incriminate Raman II. As they were not confessions they could not be taken into consideration as against Raman II under the provisions of section 30 of the Evidence Enactment.

The learned Judge, however, rejected all four statements on the ground that they had been sworn, contrary to the provisions of section 115(v) of the Criminal Procedure Code, and at the close of the case for the prosecution the Deputy Public Prosecutor withdrew against the first accused, and he was discharged, such discharge being declared not to amount to an acquittal. The Judge also acquitted the other accused under the provisions of section 190 of the Criminal Procedure Code.

Against the acquittal of the 2nd, 3rd and 4th accused, the Public Prosecutor has appealed. The

main ground of appeal was that the statements above referred to had been wrongly rejected. The Legal Adviser, who appeared in support of the appeal, submitted that if he succeeded in the appeal a new trial should be ordered under the provisions of section 42 (i) (a) of the Courts Enactment, though he expressed his readiness to abide by any indication from the Court that such new trial should not be proceeded with.

The whole basis of the learned Legal Adviser's argument was that *prima facie* any statement by an accused person is relevant and admissible, and that it can only be rejected if there is an express provision to that effect. He argued further under section 420 of the Criminal Procedure Code, that, even if there had been an irregularity, it could be cured by calling the Magistrate who took the statement to prove that the statement had been made voluntarily.

I find myself unable to agree to either argument.

The general rule which is applicable both to civil and to criminal trials is that facts other than the contents of documents shall be proved by oral evidence. The admission of written statements is accordingly an exception to the general rule, and such statements are only admissible if there is statutory provision to that effect. It follows that they are not admissible unless those provisions have been complied with. An admission (which includes a statement and a confession) is made relevant by section 21 of the Evidence Enactment. The Evidence Enactment provides (section 24) that a confession is irrelevant if it was obtained as the result of any inducement etc. Section 25 provides that a confession to a police officer below the rank of Inspector shall not be proved against him, and section 26 that no confession shall be proved against a person who is in custody unless it is made in the presence of a Magistrate. The Evidence Enactment does not provide similar safeguards in the case of a statement which does not amount to a confession.

The Criminal Procedure Code amplifies the provisions of the Evidence Enactment not only with regard to the method of recording statements, but also with regard to their admissibility. In particular section 112 (i) provides that no statement (which includes a statement by an accused person) made to a police officer in the course of a police investigation shall be used in evidence. This clearly makes inadmissible statements, not amounting to confessions, which would otherwise be admissible under the provisions of the Evidence Enactment. Section 114 (i) provides that no inducement shall be offered in the case of any statement, whereas section 25 of the Evidence Enactment is confined to confessions. Section 115 of the Criminal Procedure Code provides how confessions and statements are to be recorded. Section 115 (iii) makes it incumbent upon the Magistrate who records the statement or confession to satisfy himself that it is voluntarily made before he takes such statement or confession, and in the case of a confession he is again enjoined to record a memorandum after it has been made to the effect that it has been made voluntarily. There is nothing in the Evidence Enactment requiring that there should be any evidence that a statement not amounting to a confession has been made voluntarily.

In view of all these provisions it appears to me to be idle to contend that all the rules for the admissibility of evidence are contained in the Evidence Enactment. It would no doubt be convenient that all the provisions relating to a particular subject should be contained in the same statute, but the Legislature is paramount, and if it chooses to insert in the Criminal Procedure Code provisions as to evidence which would be more suitable in the Evidence Enactment, there is nothing to prevent the Legislature from doing so.

I need only refer to section 442 of the Criminal Procedure Code and to Enactments such as the Common Gaming Houses Enactment, the Opium and Chandu Enactment, the Excise Enactment, and similar Enactments, to establish beyond possible doubt that it is open to the Legislature to provide special rules of evidence in certain cases, and that there has been no attempt to confine rules of evidence exclusively to the Evidence Enactment.

I conclude, therefore, that the rules as to the admissibility of statements and confessions in the Evidence Enactment having been supplemented, and in some cases modified, by the provisions of the Criminal Procedure Code, before any such statements and confessions can be received in evidence the provisions of both Enactments must be complied with. This brings me to section 115 (v) which definitely provides.

> "No oath or affirmation shall be administered to any person making a statement or confession as in this section provided."

I cannot regard this as a mere piece of friendly advice to the Magistrate, or as an indication to the person making the statement that if he perjures himself he will not be liable to any penalty. The subsection contains a direct statutory prohibition with regard to the taking of statements and confessions. If this prohibition is disregarded then it ceases to be the kind

of statement or confession which a Magistrate is given liberty to record under section 115(i) and is *prima facie* inadmissible.

The learned Legal Adviser, however, relied upon the provisions of section 420 of the Criminal Procedure Code which reads as follows:—

> "If any Court before which a confession or other statement of an accused person recorded under section 115 or 256 is tendered or has been received in evidence finds that any of the provisions of such section have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and if it is satisfied of the same such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

He argued that the fact that the persons making the statements were made on affirmation was a non-compliance with section 115(v). That is no doubt the case. But when the Court has ascertained that there has been a non-compliance, section 420 does not say that the irregularity can be *ipso facto* waived. On the contrary the Court shall take evidence from the Magistrate "that the person duly made the statement recorded", and shall only admit the statement if satisfied (a) that the statement was duly made and (b) that the error has not injured the accused as to his defence on the merits.

In the case before the Court, the Magistrate was called and could only confirm—what was obvious on the face of the statements—that the persons who made them had been affirmed. His evidence was useful in establishing that the words 'sworn statement' were not a mistake, but that in fact the persons were sworn. Thereupon it became clear that the statements had not been "duly made", and section 420 of the Criminal Procedure Code was of no assistance.

Section 420 is very useful where the statement has been properly taken but the Magistrate has failed to record the fact—just as in the present case the Magistrate might have deposed that the persons had not been sworn though the statements recorded the contrary. If, however, the effect of the Magistrate's evidence was that the statement had not been voluntarily made, it would obviously have been inadmissible. The same result follows when it has been proved to have been made on affirmation.

This finding is sufficient to dispose of the appeal, and I prefer to express no opinion upon the issue as to whether the fact of the statement having been made on affirmation would deprive it of its voluntary character, even apart from the provisions of section 115(v) which are peculiar to the F.M.S.

I would only add that even if the statements had been wrongly rejected I would still see no ground for ordering a new trial. Without going into all the merits of the case, it is clear that the *viva voce* evidence, which tended to incriminate Velupillay, was entirely inconsistent with the statements and the confession which pointed to the guilt of Raman II.

It is only recently that the Public Prosecutor has been empowered by law to appeal against an acquittal after a trial before an Assize Court, and so far as I am aware this is the first occasion upon which this power has been exercised after an acquittal upon a charge of murder. I do not think it likely that this Court would allow such an appeal even to the extent of granting a new trial, unless the facts of the case proved beyond all possible doubt that there had been a gross and palpable miscarriage of justice, or that there had been an error upon a point of law, which, if correctly decided, might reasonably have led to a different verdict. In the case before the Court, these elements are most conspicuously absent. Even if all the statements had been admitted, I do not see how the assessors could reasonably have found any of the accused guilty of murder. There is the additional consideration that the statements of the 1st, 2nd and 4th accused were not admissible in evidence against Raman II, and if they had been admitted against the persons who made them, it would clearly have been idle to warn the assessors that they should not take them into consideration against any one else. The inadmissible evidence would be before the Court, and the minds of the assessors and of the Judge would inevitably be influenced thereby. It is difficult to understand on what principle it was decided to charge all the accused jointly, when the result would be to deprive Raman II of the substance of a fair trial. In my view the opinion expressed by the learned trial Judge that the accused should not have been charged jointly was fully justified.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

February 12, 1940.

TAN POH WHATT v. PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 84 of 1939]

Women and Girls Protection Enactment, (Cap. 156), S. 7 (b)—knowingly permitting premises to be used as brothel—proprietor and manager—knowledge of manager imputable to proprietor.